

LAW OFFICES
LIVENGOOD, FITZGERALD & ALSKOG

A PROFESSIONAL LIMITED LIABILITY COMPANY

JAMES S. FITZGERALD*
DAVID A. ALSKOG
DAVID B. JOHNSTON
JOHN J. WHITE, JR.
DAVID J. SEELEY**
JAMES E. HURT
KEVIN B. HANSEN
THOMAS K. WINDUS+
GREGORY A. MCBROOM

121 THIRD AVENUE
POST OFFICE BOX 908
KIRKLAND, WASHINGTON 98083-0908

PHONE (425) 822-9281
FAX (425) 828-0908
E-mail white@lfa-law.com

*ALSO ADMITTED IN OREGON
**ALSO ADMITTED IN CALIFORNIA
+OF COUNSEL

PHILIP L. CARTER, RETIRED
ROBERT P. TJSSEM, RETIRED

GORDON A. LIVENGOOD (1921 - 2001)

May 25, 2006

VIA UPS NEXT DAY AIR

Mr. Jeff S. Jordan
General Counsel's Office
Federal Election Commission
999 E Street, NW
Washington D.C., 20463

RE: MUR 5736

Dear Mr. Jordan:

I am responding to your letter dated May 9, 2006 regarding a complaint filed by Washington State Democrat Party Chairman Dwight Pelz. The FECA has clearly established by regulation and advisory opinion that compensation for services rendered to an employer "irrespective" of a candidacy are not "contributions" under the Federal Election Campaign Act. Several years of public filings by Safeco Corporation with the Securities and Exchange Commission show beyond dispute that compensation paid to Mr. McGavick for services as Chairman and CEO and under his employment agreement and the Transition Services Agreement were made "irrespective" of Mr. McGavick's candidacy.

The complaint takes snippets of information and combines them with hyperbole. The complaint cites to the employer's SEC filings, but omits any reference to the balance of those employer filings, or the employer's reports in the same documents that contravene the complainant's factually unsupported allegations. The complaint is meritless and warrants no further action by the Commission or its staff

Much of the complaint asserts violations of the FECA merely by virtue of Mr. McGavick's continuing to provide services to Safeco after becoming a candidate. For over 30 years, the Commission has recognized that "an individual may pursue gainful employment at the same time he or she is a candidate for a federal office." Advisory Opinion 1977-45 *citing* Advisory Opinion 1976-70. As the Commission has again recently noted, continued employment and candidacy for office are not mutually exclusive. Advisory Opinion 2006-13 *citing* Advisory Opinion 1979-74.

In adopting the current regulation regarding the exclusion of *bona fide* compensation arrangements from status as a "contribution" under the FECA, the Commission expressly relied on its prior series of advisory opinions, and intended no change by virtue of codifying its position in

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- The compensation results from *bona fide* employment that is genuinely independent of the candidacy;
- The compensation is exclusively in consideration of services provided by the employee as part of the employment; and
- The compensation does not exceed the amount of compensation which would be paid to any other similarly qualified person for the same work over the same period of time.

11 CFR 113.1(g)(6)(iii). Mr. McGavick's compensation from his Safeco employment meets all three criteria.

**Safeco's payments to Mr. McGavick arose from
a long-term bona fide employment arrangement.**

Mr. McGavick joined Safeco as its CEO in January, 2001 and became Chairman the following year. His employment began approximately four and one-half years before he formed an exploratory committee to consider a possible candidacy. Safeco and Mr. McGavick entered into a written employment agreement in 2001, and amended it in January 2005.

After Mr. McGavick decided to become a candidate, he and Safeco entered into a revised agreement, the Executive Transition Services Agreement, to accomplish the orderly winding down of his duties and transition to his successor. Throughout his employment at Safeco, the Compensation Committee of the board of directors reviewed his compensation and oversaw the performance of his duties, including "senior management evaluation and succession planning . . ."¹

In Advisory Opinion 2006-13, the Commission viewed the regular performance of services over a period of several years to satisfy the *bona fide* employment portion of the regulation's test. The formal written agreements beginning long before the candidacy, and required reports to the SEC establish the *bona fide* nature of Mr. McGavick's employment. Mr. McGavick continued to perform services for Safeco through February 28, 2006. Mysliwy Declaration, ¶6.

**Safeco's payments under the employment and
Executive Transition Services Agreements were
exclusively in consideration of Mr. McGavick's
services.**

Safeco tied all payments to Mr. McGavick to his performance of services for the corporation. His base salary was paid as part of the overall compensation for his services, initially as Chairman and CEO of Safeco, and after stepping down as Chairman and CEO, in exchange for the services required under the Executive Transition Services Agreement. Safeco's annual proxy statements set out the elements of compensation for its executive officers. *See e g* 2003 Proxy Statement, p. 15-16 ("the Committee took into account his [Mr. McGavick's] success in leading Safeco's turn-around during 2001 and 2002 ...").

¹ *See e g* Safeco 2003 Proxy Statement, www.sec.gov/Archives/edgar/data/86104/00010303221003000383/ddef14a.htm p.14; 2006 Proxy Statement, www.sec.gov/Archives/edgar/data/86104/000119312506062031/ddef14a.htm, p. 19

Safeco's performance substantially improved under Mike McGavick's leadership. The 2006 Proxy Statement showed that during Mr. McGavick's employment, Safeco achieved significantly better results for its shareholders than both the S&P 500, and the property and casualty insurers that are a part of the S&P 500.² Advisory Opinion 1980-115 as well as other commission guidance confirms that an employee's value to an employer is not measured by hours alone. In Advisory Opinion 1980-115 the commission noted that there would be no contribution, even if a candidate's compensation was not reduced if the employee's "value to the firm throughout the year has increased to offset the reduction in . . . hours."

Nonetheless, Safeco did reduce compensation when Mr. McGavick became a candidate. As detailed in Safeco's Form 8-K, dated December 1, 2005, Safeco substantially reduced Mr. McGavick's base salary effective December 1, 2005 from \$1,150,000 to \$750,000. This was a nearly 40% reduction in base pay. Once Mr. McGavick's resignation as Chairman and CEO became effective, his salary was further reduced to \$100,000 per year. The reduction in base compensation from the January, 2005 agreement to the December, 2005 agreement was over 90%. This reflected the changing nature and extent of Mr. McGavick's duties for his employer. See Safeco 2006 Proxy Statement. Where compensation is reduced to reflect a lesser workload, the remaining compensation is not a contribution to a candidate who continues to perform services for the employer. Advisory Opinion 1980-115.

The complaint also takes issue with the bonus paid to Mr. McGavick in 2006 based on his 2005 performance as Chairman and Chief Executive Officer and for the additional services rendered under the Transition Services Agreement. A comparison of Safeco's historical bonus pattern throughout Mr. McGavick's tenure, as reflected in its SEC filings, shows that the bonus for 2005 services was commensurate with the performance-based bonuses awarded in prior years. The following table is derived from Safeco's definitive proxy statements:

Year	Salary	Bonus ^{3 4}	Bonus – as a % of Salary ⁵	Maximum % bonus
2001	\$ 790,972	\$2,039,235	258%	NA
2002	\$ 950,000	\$ 1,805,000	190%	200%
2003	\$1,000,000	\$1,850,000	185%	200%
2004	\$1,000,000	\$2,000,000	200%	240%
2005	\$1,116,667	\$2,314,180	207%	240%

² <http://www.sec.gov/Archives/edgar/data/86104/000119312506062031/ddef14a>, p. 35.

³ The maximum bonus for which Mr. McGavick was eligible in 2004 increased to 240% of base compensation. See 2005 proxy statement; www.sec.gov/archives/edgar/data/86104/000119312505059849/ddef14a.htm, p. 23

⁴ Factors in determining the 2005 bonus were "(i) a smooth and orderly transition of the responsibilities of the Chief Executive Officer, (ii) the executive's commitment to remain with Safeco until the Separation Date [February 28, 2006], (iii) the performance of [Mr. McGavick's] duties [under the transition services agreement], and (iv) Safeco's financial and operating performance for fiscal 2005." See Executive Transition Services Agreement, attached as Exhibit 10.1 to Safeco's Form 8-K. www.sec.gov/archives/edgar/data/86104/000119312505238392/dex101.htm; Safeco 2006 proxy statement, <http://www.sec.gov/Archives/edgar/data/86104/000119312506062031/ddef14a.htm>, p.36.

⁵ The 2001 bonus figure includes performance-based bonus and a hiring bonus

The 2005 bonus compensation was also paid "irrespective" of Mr. McGavick's candidacy. Like the situation in Advisory Opinion 2006-13, this portion of the compensation package was a "hybrid formula." It took into account Mr. McGavick's achievement of objectives during his tenure as Chairman and CEO during 2005, his employer's overall financial success and performance of his obligations to enable a smooth transition for his employer to a new Chief Executive. The 2005 bonus to Mr. McGavick was in the same range of bonuses in the years before he became a candidate.

A smooth transition during and following the departure of a Chief Executive is critical to the health of a large corporation such as Safeco.⁶ The Directors of a publicly-traded company such as Safeco have well-recognized fiduciary duties to their shareholders. Safeco regularly uses a compensation consultant to assist it in structuring compensation paid to key executives. As reflected in its proxy statements, Safeco targets its compensation packages to its executives to make them comparable to packages offered by similar, competing enterprises.⁷

Safeco retained two consultants to assist it in structuring Mr. McGavick's severance agreement, so that the agreement would be commensurate with what similarly situated companies offer and to assist the board of directors in carrying out their fiduciary duties to shareholders.⁸ The Executive Transition Services Agreement combined elements of both an ongoing compensation arrangement (for the ongoing CEO services and work to provide a seamless transfer of management) as well as elements of a severance agreement. In Advisory Opinion 2004-8, the Commission considered whether a severance agreement constituted a "contribution" by an employer. In that advisory opinion, the Commission compared a severance package provided to the employer-candidate with other severance packages offered by the employer. The Commission looked to the employer's practice.

Safeco's contemporaneous practice regarding executive severance demonstrates that Mr. McGavick's compensation under the Executive Transition Services Agreement qualifies as consideration for services performed. Just months before its agreement with him, Safeco entered into an Executive Transition Services Agreement with another named officer, Christine Mead, on substantially similar terms. Both Mr. McGavick and Ms. Mead occupied somewhat comparable positions, with Mr. McGavick's duties being more extensive, covering ultimate responsibility for the success of all Safeco companies. Both employees left voluntarily, after significant periods of employment with the company.⁹

As with the severance package in Advisory Opinion 2004-8, Mr. McGavick's package is tied to a long-term, *bona fide* employment arrangement. Safeco determined that the Executive Transition Services Agreement was in its business interest. At no time did Safeco intend to provide anything other than fair compensation to Mr. McGavick for his services. Declaration of Mysliwy, ¶¶ 4-5. As with the employer in Advisory Opinion 2004-8, Safeco evaluated entering into a transition services agreement and its contents based on its need for such services, the value added to Safeco by having the employee continue to render services, and the potential damage to Safeco's business if the employee were to join a competitor.

⁶ Mr. McGavick initially intended to step down in August, but agreed to continue as CEO and Chairman until Safeco could locate a replacement. <http://www.sec.gov/Archives/edgar/data/86104/000119312505177449/d8ka.htm>

⁷ Compare e.g. 2005 Proxy Statement, <http://www.sec.gov/Archives/edgar/data/86104/000119312505059849/ddef14a.htm>, p. 19-22 and 2006 Proxy Statement <http://www.sec.gov/Archives/edgar/data/86104/000119312506062031/ddef14a.htm>, p. 19-22

⁸ See 2006 Proxy Statement, pp. 24-25, *supra*

⁹ The terms of the two agreements are summarized in the 2006 Proxy Statement, p. 36, *supra*.

The similarity of Mr. McGavick's arrangement with that of Ms. Mead is objective evidence that the payments made under the Executive Transition Services Agreement to Mr. McGavick related solely to services rendered to Safeco, and not to his status as a federal candidate. Christine Mead served as CFO of Safeco Corporation. In August, 2005 she separated from service with Safeco. She had been employed by Safeco for approximately one year less than Mr. McGavick.¹⁰ Ms. Mead's agreement was entered into August 11, 2005 and her final resignation date under the agreement was set at December 31, 2005.¹¹ Under her agreement there was also an acceleration of a substantial number of option shares. Both Ms. Mead and Mr. McGavick, under their Executive Transition Services Agreements were entitled to keep all stock options that vested on or before their final date of employment. Mr. McGavick forfeited approximately \$7 million in compensation.¹²

In the Executive Transition Services Agreements, both Mr. McGavick and Ms. Mead agreed to a period of noncompetition with Safeco. Under Ms. Mead's agreement her noncompetition period was two years, where before she had no obligation not to compete. Under his Executive Transition Services Agreement, the term of Mr. McGavick's agreement not to compete was extended from one year to three years (a two-year increase).¹³

For a severance package to be excluded from the definition of "contribution," what is required is proportionality among employees covered by similar arrangements. See Advisory Opinion 2004-8. In holding that a severance package did not constitute a contribution, the Commission distinguished Advisory Opinion 2000-1 for several reasons. First, the situation in Advisory Opinion 2000-1 involved paid "leave" as opposed to a severance of the employment relationship and also because the factors involved in determining whether to grant "leave" were not based solely on the services previously rendered by the employee. The exercise of discretion on the part of the employer in structuring a severance package was not a disqualifying factor in Advisory Opinion 2004-8 because the discretion was with respect to evaluating the service-related record of the employee. Mr. McGavick's situation is much closer to that of Advisory Opinion 2004-8. Here, there is a contemporaneous and similar executive transition services agreement granted to a subordinate officer of the company, who departed for reasons other than a federal candidacy. As in Advisory Opinion 2004-8, this is "additional evidence that [the] package is compensation 'irrespective of the candidacy.'"

The complaint also objects to Mr. McGavick's vesting of benefits under the Safeco employee's cash balance plan. This plan applies to all Safeco employees and is subject to the laws and regulations of ERISA. The following summary of the Cash Balance Plan is from Safeco's 2006 Proxy Statement:

In general, all employees become eligible to participate in The Safeco Employees' Cash Balance Plan following one year of service with Safeco, provided they work a minimum of 1,000 hours. The Cash Balance Plan is credited with an amount equal to 3% of the annual compensation (base salary and bonus) of participating employees plus 5% interest

¹⁰ See Safeco 2003 proxy statement, www.sec.gov/archives/edgar/data/86104/000103221003000383/ddef14a.htm, p. 19, and 2006 proxy statement, <http://www.sec.gov/Archives/edgar/data/86104/000119312506062031/ddef14a.htm>, pp. 27-29

¹¹ Her Executive Transition Services Agreement can be found at <http://www.sec.gov/Archives/edgar/data/86104/000119312505216729/dex101.htm>

¹² Safeco 2006 Proxy Statement, p. 36, *supra*.

¹³ Safeco 2006 Proxy Statement, p. 36, *supra*.
<http://www.sec.gov/Archives/edgar/data/86104/000119312505170291/d8k.htm>

on the cumulative amount credited for prior years (together, the "Accrued Benefit"). The portion of the Accrued Benefit in excess of limitations imposed under Section 401(a)(17) of the Internal Revenue Code is accrued under the DCP. Employees do not contribute to the Cash Balance Plan. An employee's balance in the Cash Balance Plan becomes vested at a graduated rate, starting after two years of service with full vesting after five years of service. Participants may elect to receive, after termination, a lump-sum distribution of their vested balances or an annuitized payment from the Cash Balance Plan's trust fund. The Cash Balance Plan complies with the Employment Retirement Income Security Act of 1974, as amended.¹⁴

Under ERISA, Mr. McGavick's benefit under the plan was required to vest if he remained employed by Safeco as of the vesting date. Safeco would have violated provisions of ERISA had it denied that benefit to any employee who met the service requirement.

Safeco's compensation to Mr. McGavick did not exceed what would have been paid to another similarly qualified person for the same work

The third part of the test under 11 CFR 113.1(g)(6)(iii) is whether the compensation does not exceed that which would be paid to another similarly qualified person for the same work over the same period of time. Safeco's historical statements in its annual proxy statements, its practice regarding Mr. McGavick and Safeco's compensation of his successor are compelling evidence that the company paid Mr. McGavick what it would have paid (and is paying) to another CEO-Chairman. A review of the Safeco Annual Proxy Statements from 2002, 2003, 2004 and 2005 shows that Safeco's policy regarding compensation of its officers generally and Mr. McGavick particularly were based on the work performed, comparable company compensation and results generated.

In its 2005 Proxy Statement, Safeco's Compensation Committee reported to its shareholders,

We pay at levels and with types of compensation that are competitive with our peers. We evaluate company performance and individual compensation and compare them with comparable data from our peers. To confirm that executive compensation continues to be competitive given our lines of business, size and the geographic location of our executive officers, we review information regarding compensation practices of our competitors (including most of the companies that are in the S&P Insurance Index as well as other competing companies of a similar size to us). In addition, we review information concerning executive compensation practices and compensation levels obtained from (i) three independent consulting firms retained by us or Safeco's Human Resources department, and (ii) the proxy statements of publicly held companies.¹⁵

As shown in Safeco's 2006 SEC filings, Safeco's compensation committee reviewed compensation of 24 similarly-situated insurers to make sure that its executive compensation is

¹⁴ <http://www.sec.gov/Archives/edgar/data/86104/000119312505059849/ddef14a.htm>, p. 32.

¹⁵ www.sec.gov/Archives/edgar/data/86104/000119312505059849/ddef14a.htm, p.20.

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comparable to its competitors. Safeco reviewed the specifics of the executive transition services agreement for Mr. McGavick with its regular consultant and a special consultant, before reaching a conclusion that the compensation was comparable to its competitors, and consistent with the board's fiduciary duties to Safeco's shareholders.

Safeco's compensation package with Mr. McGavick's successor is similar to his. Safeco provides his successor with comparable base pay, similar available bonus percentages and equity-based compensation. The third part of the regulation's test is also met.

Conclusion

The compensation paid for Mr. McGavick's 2005 services as Safeco's Chairman of the Board and CEO and under the Executive Transition Services Agreement represented compensation under a long-standing employment arrangement that can only be described as *bona fide*. The compensation was tied explicitly to the provision of critical services to Safeco, either as its Chairman and Chief Executive Officer or to assist Safeco in achieving a smooth transition to a new corporate chief. The terms of the Executive Transition Services Agreement for Mr. McGavick were similar to those offered to another "named officer" of the corporation who did not become a federal candidate. Finally, Safeco's SEC filings make clear that the company habitually reviewed its executive compensation arrangements to make sure that they were comparable to other similarly-situated insurers. This was done for the purpose of meeting Safeco's business needs to attract and retain qualified executives and for the Board of Directors to meet its fiduciary duty to the shareholders to oversee wisely the corporation's affairs. The Commission's long standing interpretations of 11 CFR 113.1(g)(6)(iii) support dismissal of the complaint with no further action.¹⁶

If you have any questions, please contact me at the address and telephone number listed above.

Very truly yours,

LIVENGOOD, FITZGERALD
& ALSKOG, PLLC


John J. White, Jr.

JJW:lw
Enclosure

¹⁶ That the complaint lacked merit and was motivated by nothing more than a desire to generate negative publicity for Mr. McGavick is further evidenced by the fact that Mr. Pelz names only the campaign as a respondent and not the corporate employer.

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RE: MUR 5736

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Declaration of Allie Mysliwy

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I, Allie Mysliwy, hereby declare under penalty of perjury under the laws of the United States that the following is true and correct:

1. I am now and at all times herein mentioned was a citizen of the United States and a resident of the State of Washington, over the age of eighteen (18) years, not a party to or interested in the present action and competent to be a witness therein.

2. I am an executive vice president of Safeco Corporation and responsible for human resource and compensation matters. I have served in a human resources role at Safeco since 1994.

3. Part of my duties during 2005 involved the development, at the direction of the Compensation Committee of Safeco's Board of Directors, and with the assistance of outside compensation and benefits consultants, of an Executive Transition Service Agreement for Mr. McGavick, Safeco's former chairman and chief executive officer.

4. When Mr. McGavick indicated his intent to leave Safeco, Safeco's Board of Directors determined it would be in Safeco's best interest for Mr. McGavick to continue performance of his duties, even at a reduced level, until a successor could be found.

5. At no point did Safeco intend to compensate Mr. McGavick in any capacity other than in connection with the services he had provided to Safeco as its

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employee. As set forth in the Compensation Committee report included in Safeco's 2006 Proxy Statement, to attract and retain top talent, Safeco pays at levels and with types of compensation that are competitive.

6. As set forth in the Compensation Committee report included in Safeco's 2006 Proxy Statement, Mr. McGavick continued to provide services to Safeco through February 28, 2006.

DATED this 24 day of May, 2006, at Seattle, Washington.


Allie Mysliwy

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